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Employment Screening for Criminal Records Attorney General's Recommendations to Congress

August 3, 2005

Mr. Richard A. Hertling
Deputy Assistant Attorney General
Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Employment Screening for Criminal Records (OLP Docket No. 100)
Attorney General's Recommendations to Congress

Dear Mr. Hertling:

We appreciate this opportunity to comment on the Attorney General's initiative to evaluate the nation's policies related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

Our organization, the Massachusetts Law Reform Institute, provides high quality legal representation to, and impact advocacy on behalf of, low-income individuals. We have a special interest in the Attorney General's report and recommendations to Congress because we provide effective legal assistance to people with criminal records to enhance their employment opportunities, provide training on job screening practices to employers, as well as pursue systemic reforms of laws impacting individuals with criminal records.

I. Recommendations for Federal Priorities

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes." In addition to 14 specific policy themes identified by Congress, the Department is authorized to make recommendations related to "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

Based our experience advocating for the employment rights of people with criminal records, we urge the Department to incorporate two key concerns as a framework for responding

to the policy challenges identified by Congress. First, we are especially concerned that the unprecedented volume of criminal records checks for employment purposes elevates the risk of error and abuse of the employment screening process. *Thus, to compensate for the unprecedented potential for harm to the nation's workers, we recommend that the Attorney General give special weight in its policy proposals to the full range of privacy, civil rights and basic employee protections.*

In order to more effectively promote public safety, new federal policies must also limit unwarranted barriers to employment for people with criminal records. As President Bush indicated in his 2004 State of the Union address, "We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life." *Accordingly, the Attorney General's recommendations to Congress should be carefully tailored to promote public safety both in the workplace and in those communities hit hard by crime, thus taking into account the impact of employment prohibitions in screening laws on the economic opportunities of people with criminal records.*

II. Specific Policy Recommendations

A. Adopt Employee Protections Necessary to Compensate for the Expanded Reliance on Criminal Records

The federal law specifically calls on the Attorney General to make recommendations related to "privacy rights and other employee protections." (Section 6403(d)(5)). We strongly support policies to expand procedural rights in federal laws designed to ensure that criminal records are complete and accurate while also protecting privacy. In addition, we urge the Department to promote substantive employee protections that determine the appropriate limits on the scope of criminal background checks.

1. Adopt substantive worker protections defining the proper scope of federal and state employment prohibitions based on criminal records.

The Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications in federal and state laws based on an individual's criminal record. (Sections 6403(d)(5), (15)).

- Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.
- Absent special circumstances, new employment prohibitions based on an individual's criminal records should only apply prospectively, not to current workers.
- Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.

- All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.
 - Employment prohibitions imposed by federal law should “directly relate” to the responsibilities of the occupation, thus especially broad categories of offenses should be more closely scrutinized (including blanket felony rules and disqualifications based non-violent crimes, including drug offenses, that disproportionately disqualify people of color).
- 2. Adopt stronger procedural rights to ensure that employment decisions are based on more complete criminal records while also protecting the individual worker’s privacy.**

We urge the Department to adopt the following recommendations to strengthen the procedural guarantees designed to ensure that criminal records are complete and reliable and that their privacy is adequately protected.

- Create additional safeguards against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions. (Sections 6403(d)(5), (8), (12)).
- Federal procedural protections should be significantly strengthened by making the FBI’s information available to all those who produce a criminal record while also clarifying that the opportunity to correct the individual’s record should be available before an adverse employment determination is made by any authorized agency or employer. (Sections 6403(d)(5)(B), (15)).
- Consistent with current federal practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI. (Section 6403(d)(5)(c)).

**B. Strictly Limit the Scope of Private Employer
Access to Federal Criminal Record Information**

We urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records. (Sections 6403(d)(7), (9)). Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse by employers which will unfairly penalize the nation’s workers. Thus, the employer’s role should be limited to receiving the standard results of a “fitness determination” from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws.

C. Employers, Not Workers, Should Absorb the Fees Requiring or Authorizing a Criminal Records Search for Employment Purposes

Federal laws authorizing employers to request FBI criminal records should direct that the employer pay the full costs of the fingerprinting and processing of the criminal records, while also precluding employers from seeking to recoup the fee, either directly or indirectly, from the worker's compensation. (Sections 6403(d)(7), (10)).

Absent these protections, the significant fees associated with fingerprint-based criminal records searches will impose a financial hardship on working families, especially on the many new categories of entry-level workers who are now required to be fingerprinted and screened for criminal records. In addition, the absence of federal laws regulating who pays for the criminal records search often leads to fees being passed on workers and to inequitable treatment of similarly-situated individuals from different states.

D. Federal and State Agencies Should Strengthen their Infrastructure to Produce Reliable Criminal History Information, Not Rely on Commercial Providers of Criminal History Data and Screening Services

We urge the Department to adopt the following recommendations which strictly limit, not expand, the functions of commercial firms as they relate to employment screening of criminal histories required by federal and state laws.

- Commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry's lack of compliance with privacy protections. (Section 6403(d)(1)).
- Because the demands to comply with new employment screening mandates require a strategic investment in the federal and state infrastructure, Congress should revisit the FBI's recent guidance authorizing governmental agencies to outsource sensitive screening functions involving the FBI's criminal records system. (Section 6403(d)(13)).

* * *

Thank you for the opportunity to comment on this especially timely initiative to help shape the nation's policies regulating employment screening for criminal records. As these policies fast evolve to meet the public's concern for safety and security, now is the time to ensure that stronger worker protections and meaningful employment opportunities for people with criminal records become a key priority as part of a more fair and effective regime of criminal background checks.

Sincerely,

Francisca D. Fajana
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